WYOMING AUDUBON ET AL.

IBLA 98-337 Decided October 22, 1999

Appeal from a decision of the Wyoming State Director, Bureau of Land Management, approving a Record of Decision and Final Environmental Impact Statement for the Jonah II Natural Gas Development Project. WY 1793 (930).

Affirmed; stay request denied as moot.

1. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

   BLM did not err in not adopting a 2 mile buffer zone for sage grouse leks or strutting grounds in the ROD/FEIS where authorities relied on in support of a 2 mile buffer zone and addressed widespread sagebrush eradication rather than the more limited impacts associated with oil and gas operations, and no scientific evidence was offered showing that a 2 mile buffer zone was necessary to protect sage grouse leks or strutting grounds.

2. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

   BLM did not violate seasonal sage grouse restrictions identified in the RMP where the RMP also provided for modification of the restrictions if necessary based upon environmental analysis of specific proposal and site specific mitigation, and BLM prepared an environmental impact statement modifying the seasonal restriction based on post-RMP research more clearly defining sage grouse breeding and nesting activity and required site-specific mitigation which protects nests and chicks identified through required surveys.

3. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

   Where the scientific data relied on by BLM and appellants indicate that a 1/2 mile buffer zone

is preferable but not essential to protect sage grouse leks, and there is no scientific evidence or studies indicating a 1/4 mile buffer zone with appropriate mitigation measures is insufficient to protect sage grouse leks, BLM's conclusion that a 1/4 mile buffer zone with additional mitigation is sufficient to lessen the impact on sage grouse due to oil and gas development will be affirmed.

APPEARANCES: Barb Gorges, President, Wyoming Audubon, for appellant Wyoming Audubon; Linda B. Rawlins, pro se; Andrea S. V. Gelfuso, Esq., U.S. Department of the Interior, Office of the Regional Solicitor, Rocky Mountain Region, Denver, Colorado, for the Bureau of Land Management; John F. Shepherd, Esq., Denver, Colorado, for Intervenors McMurry Oil Company and Amoco Production Company.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Wyoming Audubon and Linda B. Rawlins have appealed and requested a stay of an April 27, 1998, decision of the Wyoming State Director, Bureau of Land Management (BLM or the Bureau), approving a Record of Decision and Final Environmental Impact Statement (ROD/FEIS) for the Jonah II Natural Gas Development Project. On June 25, 1998, the Board granted the Bureau an extension of time within which to file an answer to appellants' Statement of Reasons (SOR) and took appellants' request for a stay under advisement. On September 3, 1998, we granted McMurry Oil Company and Amoco Production Company's joint Motion to Intervene and granted Intervenors' request for an extension to and including September 28, 1998, within which to file an answer to appellants' SOR and to respond to appellants' request for a stay. Appellants were granted 30 days from receipt of BLM's Answer to file a response and to respond to the answer filed by McMurry and Amoco. Appellants seek a "stay that affects only those [natural gas] wells that are to be drilled within two miles of an identified sage grouse lek." (SOR and Request for Stay at 13.) Because we reach the merits of this appeal and affirm BLM, appellants' stay request is denied as moot. 1/

The EIS for the project analyzes the Proposed Action; Alternative A, a sensitive resource protection alternative development strategy; Alternative B, a maximum density alternative development strategy; and a No Action Alternative. Other alternatives requiring higher or lower well densities were considered or rejected for environmental, economic and/or legal reasons. BLM's preferred alternative for the project is the Proposed Action with selected mitigation measures, as described in the Draft Environmental

1/ On Apr. 12, 1999, Intervenors filed a "Motion to Allow BLM to Process an Application For In-Fill Drilling while Appeal is Pending or, In The Alternative for Expedited Consideration." Considering our disposition of this appeal, this motion is also denied as moot.

Impact Statement (DEIS) and FEIS, which would further reduce environmental impacts. (FEIS, Executive Summary at v.) On appeal, appellants challenge the adequacy of two mitigation measures contained in the ROD/EIS: the 0.25 mile buffer zone around sage grouse leks or strutting grounds that will remain free from surface disturbance and the March 1 to June 30 seasonal restriction on construction designed to avoid displacing sage grouse from nesting habitat.

The ROD states with respect to sage grouse:

> The sage grouse is the predominant and most important game bird in the analysis area. Data from the WGFD [Wyoming Game Fish Department] indicate that State-wide numbers of sage grouse declined between 1987 and 1992.
>
> The entire analyses area is generally considered year-round habitat for sage grouse. Important areas for these birds are strutting grounds (leks), brood-rearing areas, and wintering areas.
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> * * * * * * *
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> Lek Protection - to avoid displacing sage grouse from strutting, surface disturbance within 0.25 miles of a sage grouse lek (strutting ground) will be avoided. Also to avoid enhancing raptor predation on strutting sage grouse, permanent, high profile structures such as buildings, storage tanks overhead power lines, etc., will not be allowed within 0.25 miles of lek (the area may be enlarged, if justified on a case by case basis).
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> * * * * * * *
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> Nesting Protection - To avoid displacing sage grouse from nesting habitat, construction activities within a two-mile radius of active leks will be avoided from March 1 through June 30, or as designated by the BLM AO. [Bureau of Land Management Authorized Officer].
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> * * * * * * *
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> Wintering Areas - Tall sage brush * * * will be avoided except to cross the drainages at right angles. This will be done to minimize disturbance of tall sage brush which is important sage grouse wintering habitat.

(ROD at 21-22.)

With respect to the 0.25 mile buffer zone provided for lek protection, appellants contend BLM erred in not requiring a 2 mile, or alternatively, a 0.5 mile buffer zone as provided in Alternative A to provide "additional protection of sage grouse leks." (FEIS Executive Summary at viii.)

Regarding nesting protection, appellants argue that, "without reasonable explanation, BLM Resource Management Plan-approved seasonal restrictions have been shortened by two months in the [ROD]." (SOR at 2.) They argue that "[s]easonal restrictions to protect sage grouse nesting and brood-rearing areas in the Pinedale Resource Area RMP are set from Feb. 1-July 31 (USDI BLM, RMP FEIS, 1987, 4; RMP ROD, 1988, 59)," while the ROD at 22 provides for a March 1 to June 30 seasonal restriction. (SOR at 4.) Appellants conclude that there is no "basis to change a legally-binding decision made in an existing BLM [RMP] EIS." Id. at 6. While appellants acknowledge that the Jonah II FEIS appears to comply with the guidelines of the RMP with respect requiring field evaluations for sage grouse leks between February 1 and March 15, and for sage grouse nesting between April 1 and July 1, they complain that the seasonal restriction directly contradicts the (Pinedale) RMP guidelines. Id. at 7.

In response, the Bureau states that appellants rely on a Table contained in the RMP, but "ignore language elsewhere" in the RMP which allows for modification of the dates of sage grouse seasonal restrictions. (BLM Answer to Request for Stay and SOR (BLM Answer) at 2.) The RMP at 8 states that "use restrictions (e.g., dates, distances) may be made more or less stringent depending upon the need of specific situations," and at 59, provides that "[m]odifications to this limitation in any year may be approved in writing by the Authorized Officer." (Intervenors' Answer and Response to Stay Request, Exhibit (Ex.) A.) BLM maintains that modifications were authorized by the subject ROD/FEIS based on scientific research more clearly defining sage grouse breeding and nesting activity. The WGFD, an agency cited by appellants as having expertise in this area, BLM notes, "concurred with the BLM's seasonal restrictions in their comments on the FEIS." (BLM Answer at 4.)

Richard Wallestad in a BLM article entitled "Life History and Habitat Requirements of Sage Grouse in Central Montana" (1975), observed that "the strutting display of sage grouse has been described in detail [citations omitted]. Cocks establish territories on traditional strutting grounds in early March, assembling on grounds an hour or so before dawn and strutting until approximately one hour after sunrise." (BLM Answer, Ex. C, Breeding Activities, at 1.)

Thus, BLM denies that there is a need to restrict activities around a sage grouse lek in February when the males do not use the leks until March:

> Breeding then occurs in early April, but some hens may return to the lek into May to breed. See Agency Exhibit D, Environmental Assessment for the Big Piney LaBarge Coordinated Activity Plan, USDI-BLM 1990, p. 37. Nesting occurs from mid-April

> through mid-June. See Agency Exhibit E, BLM Technical Note "Habitat Requirements and Management Recommendations for Sage Grouse" pp. 15-16. Chicks hatch approximately 37 days after breeding.

(BLM Answer at 3.) BLM reasons that "if a hen returned to the lek for breeding for the last time on May 10, which is considered late in the breeding cycle, the eggs should hatch 37 days later, i.e., June 23. Id. Thus, BLM concludes that "even late-hatching chicks would have a week to leave the nest area before any activity would begin." Id. at 3. BLM denies that there is any reason to restrict use in order to protect nest sites when the young have left the nests, which normally peaks by mid-June. See BLM Answer, Ex. M at 8, "Draft Pinedale/Jackson Region Sage Grouse Job Completion Report 1990-1996" prepared by Doug McWhirter, Wildlife Biologist, WGFD, Pinedale, Wyoming. The ROD, BLM submits, ensures that any sage grouse that did use the area in February and July would be protected because the ROD requires that "field evaluations for sage grouse leks will be conducted by a qualified biologist prior to the start of the activities in sage grouse habitat." (BLM Answer at 3-4.) BLM insists that it preserved its ability to provide protection to active nesting sites in the ROD (Appendix C, at 14) by delaying actions until nesting is completed. Thus, BLM states that "[i]f an occupied nest is found in July, activity would not be allowed to proceed until the chicks have left the nest, regardless of the date." (BLM Answer at 4.)

Next, appellants contend that "BLM has not provided sufficient scientific evidence to support quarter-mile (0.25 mile) buffer zones around sage grouse leks or strutting grounds that will remain free from surface disturbance." (SOR at 2.) Appellants acknowledge, however, that the ROD protects leks by stipulating that "surface disturbance within 0.25 miles of a sage grouse lek (strutting ground) will be avoided." (SOR at 4.) They nonetheless criticize BLM for failing to consult with, or obtain recommendations from, the U.S. Fish and Wildlife Service (USFWS) on the buffer zones. (SOR at 5.)

Also, appellants allege that "WGFD found the BLM's lek buffer zones to be inadequate in size, as stated in response to the Jonah II [DEIS] (BLM Jonah II FEIS, 1998, 7-107)." They note that WGFD's views regarding the inadequacy of BLM's lek buffer zone were contained in a completion report dated December 1997, captioned "Sage Grouse Productivity, Survival and Seasonal Habitat Use Near Farson, Wyoming, July 1 1993 to December 30 1996," which recommends "no vegetation control within 3 km [2.2 miles] of leks (WGFD, 1997, 50)." (SOR at 5; Ex. 4.) BLM's own experts, appellants contend, concurred in WGFD's assessment, citing a 1979 BLM Technical Note, Management Recommendations (BLM, 1979, 29). (SOR at 6 and Ex. 5.) Referencing Exhibit 6 to its SOR, "Guidelines for Maintenance of Sage Grouse Habitats," by Clait E. Braun, Colorado Division of Wildlife, Wildlife Research Center, Tom Britt, WGFD, and Richard O. Wallenstad, Montana Fish and Game Department, appellants state that the Colorado Division of Wildlife (CDW), another agency with expertise, has also specified a 3 km buffer

zone around leks. Id. at 6. While appellants concede that BLM included a list of citations to justify its decision to limit the size of lek buffer zones to 0.25 mile, they deny that the cited scientific studies support BLM's decision. Indeed, appellants claim that "many of these studies directly contradict BLM's conclusions." (SOR at 10.) The Bureau's conclusions, appellants maintain, are a "plain violation of BLM's responsibility under 40 C.F.R. § 1502.24 'to insure the professional integrity, including scientific integrity, of the discussions and the analyses in environmental impact statements'." (SOR at 10.)

Appellants further contend that BLM ignored the special expertise of WGFD, CDW, and its own experts. (SOR at 10.) They maintain that WGFD recommended the "0.5 mile surface disturbance buffer surrounding sage grouse leks as defined in Alternative A. This would provide additional protection from predation, as high profile structures would not be constructed within this buffer zone." In its Answer, BLM makes the statement that it believes that "impacts to sage grouse using the 1/4 mile buffer are insignificant," but acknowledges that "there are potential impacts including noise impacts, that may reduce breeding success." (BLM Answer at 11.) In addressing BLM's statement, appellants point to WGFD's comments on the DEIS where it observed that "[t]his impact does not appear to be insignificant and seems to provide more support for increased protection of areas surrounding grouse leks. We disagree that the proposed development will have insignificant impacts to sage grouse." (SOR at 10-11, citing BLM Jonah II FEIS, 1998, 7-107, 108.) Appellants agree. (SOR at 9-11.) In response to WGFD's observation, BLM stated that it may require a 0.5 mile seasonal avoidance buffer from March 1 through May 30 to further protect leks from noise disturbance as an additional potential mitigation measure to be added to the ROD. (FEIS Comment Response 9 at 7-110; FEIS 4.2.2.5 at 42.) This mitigation measure was not selected for implementation. (ROD at 15.) Instead, BLM required that engines and compressor exhaust stacks are to be properly muffled according to manufactures' specifications to reduce noise. (ROD at 9.)

Citing a 1998 WGFD document not submitted for the record, appellants assert that WGFD has determined that "chick survival has been the predominant factor contributing to sage grouse population decline." (SOR at 10.) Appellants reason that sage grouse populations can be expected to decline "if chicks are not afforded seasonal adequate protection during the first weeks of life, total sage grouse population can be expected to decline." Id.

BLM, while not specifically disputing the importance of chick survival, disputes the implication that oil and gas operations are responsible for increases in sage grouse chick mortality. To the contrary, BLM points out that in the 1997 Completion Report relied on by appellants, WGFD specifically stated that it did not know why the chicks died. BLM argues that WGFD reached a similar conclusion in a second Draft Report captioned the

"Pinedale/Jackson Region Sage Grouse Completion Report 1990-1996," not mentioned by appellants, which specifically analyzed sage grouse population in the Jonah II Field. Id.; BLM Answer, Ex. M. The Pinedale/Jackson Report states:

> Factors responsible for recent declines continue to be debated. Suspected and proven causative agents include sagebrush eradication, overgrazing, drought, pesticides, off[-]road vehicle use, and noise from oil & gas operations. There is also a continuing debate on whether or not sage grouse experience cyclic population variations. Regardless of the reason, sage grouse are currently experiencing a region[-]wide population decline.

Id. at 1.

The 0.25-mile buffer, BLM relates, resulted from BLM's attempt to protect the integrity of leks during the era of radical sagebrush treatment projects based on guidelines established by biologists in the 1960's. Noting that appellants advocate a buffer zone of 3 km or 2 miles, BLM denies that appellants can point to any specific scientific basis supporting their contention. (Answer at 5.)

Moreover, to the extent that appellants imply that had BLM consulted USFWS, a 2 mile buffer zone would have been adopted, BLM denies that USFWS requires a 2 mile buffer zone. Specifically, BLM explains that consultation with USFWS was not required because consultation is only required for Federally listed threatened and endangered species. Further, BLM notes that, although USFWS was involved in the preparation of the Wildlife Monitoring/Protection Plan which considered "Wyoming Species of Concern," including sage grouse, USFWS did not comment on the proposed 0.25 buffer zone. BLM also notes that WGFD did not state that a 2 mile buffer zone "was required" in comments submitted on the draft or final EIS. Id.

BLM argues that appellants' reliance on "Guidelines for Maintenance of Sage Grouse Habitats" by Clait E. Braun (Ex. 6 to SOR) and the BLM article "Habitat Requirements and Management Recommendations for Sage Grouse," by Mayo W. Call, Avian Biologist, Denver Service Center (Ex. 5 to SOR), is misplaced because neither provides a scientific basis for a 2 mile buffer zone. BLM asserts that the limited disturbance associated with oil and gas operations cannot be compared with sagebrush eradication over thousands of acres, and to illustrate the point, cites to the former article's description of sagebrush eradication: "over the past 35 years an estimated 2 to 2.5 million acres of sagebrush range have been treated by burning, spraying, plowing, disking, chaining, cutting and beating in attempts to convert these ranges to grasslands" for livestock grazing. (SOR, Ex. 6 at 99.)

In contrast, BLM adds, the surface disturbance associated with oil and gas operations is small areas. The Jonah II project encompasses about 60,000 acres, and the maximum limit of sagebrush to be treated at any one

time within a 2-mile radius of a lek is 20 percent. BLM urges that the Jonah II project provides for 450 wells resulting in 3,250 acres of surface disturbance at most, or 7.2 acres of disturbance per well. At eight wells per section, 7.2 acres of disturbance per well would result in a total of 57.6 acres of disturbance per section (which contains 160 acres), scattered throughout the section. (BLM Answer at 7.) The WGFD 1997 Completion Report cited by appellants in support of the 2 mile buffer zone (SOR at 9), BLM states, involved widespread sagebrush eradication as well.

BLM urges that its adoption of the 1/4 mile buffer zone was based on consultation between wildlife biologists based on scientifically sound considerations, and that appellants have cited no scientific studies to the contrary. In his affidavit, BLM Biologist David A. Roberts admits that he has no personal knowledge of the basis for establishing the 1/4-mile buffer, and that he was able to locate only one draft edition of sagebrush management guidelines from about 1965 which contained the 1/4-mile limit. The limit was omitted from the final guidelines, however. His consultations with biologists in neighboring states revealed nothing further regarding the 1/4-mile limit. (BLM Answer at 9; BLM Answer, Ex. N at 2.) Roberts surmises that the 1/4-mile standard evolved initially because in the 1959's and 1960's BLM and the Forest Service were engaged in sagebrush eradication as a form of range impoundment, a practice of recognized as "quite detrimental" to sage grouse. See BLM Answer at 10 and Ex. N at 2. Addressing more recent studies however, Roberts states:

> While there is very little or no empirical, scientific data out there to either support or refute the 1/4 mile no surface disturbance standard, there does seem to be an increasingly large "pile" of anecdotal data accumulating to suggest a 1/4 mile may not be adequate. Some more recent (within the last 5-8 years) studies and anecdotal observations would suggest that a greater distance (possibly 1/2 mile) would be a more appropriate protective offer around sage grouse leks. Even these more recent studies, however, have not really been designed to empirically ascertain an appropriate setback distance.

(BLM Answer at 10, Ex. N at 3.) BLM in the ROD considered whether current knowledge required that the buffer be changed and concluded:

> BLM has only somewhat recently been requiring the 1/4 mile buffer. While there are some with concerns that the current 1/4 mile buffer is not enough, there is no evidence that the 1/4 mile buffer is not sufficient, nor are there any studies to support the need for a .05 mile buffer.

(ROD at 28.) The 1/4 mile buffer zone, BLM and Intervenors note, was included in several recent environmental documents, including the Green River Resource Area Plan approved in 1997 (Agency Ex. 0), and the Fontenelle and Stagecoach Draw Natural Gas Project approved in 1995 and

1996 (BLM Answer, Exs. P & Q). Acknowledging that "there may exist a legitimate difference of opinion among biologists as to what is an appropriate buffer zone for sage grouse protection," the National Environmental Policy Act of 1969 (NEPA), BLM insists, "does not require a court to resolve disagreements between scientific methodologies." (BLM Answer at 10-11.)

[1] Recently, in National Wildlife Federation, 145 IBLA 348, 378 (1998), we recognized that

> NEPA is primarily a procedural statute designed "to insure a fully informed and well-considered decision." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). It requires that an agency take a "hard look" at the environmental effects of any major Federal action. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976).
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> In Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989), the Court stated:
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> > [I]t is now well settled that NEPA does not mandate particular results, but simply prescribes the necessary process. * * * If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. * * * Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed--rather than unwise--agency action.
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> An EIS must fulfill the primary mission of NEPA, which is to ensure that a Federal agency, in exercising the substantive discretion afforded it to approve or disapprove a project, is fully informed regarding the environmental consequences of such action. See 40 C.F.R. § 1500.1(b) and (c); Natural Resources Defense Council v. Hodel, 819 F.2d 927, 929 (9th Cir. 1987).

Considering the foregoing, appellants' arguments, BLM's and the Intervenors' responses, and the record, we decline to find that BLM erred in failing to adopt a 2 mile buffer zone in the ROD\FEIS. The authorities relied on by appellants pertain to the effects of widespread sagebrush eradication, rather than the more limited impacts associated with oil and gas operations. Moreover, BLM recognizes the importance of tall sagebrush to the quality of sage grouse habitat and intends to limit disturbance of tall sagebrush in critical areas. (ROD/FEIS at 22.)

[2] Appellants have also not shown that the seasonal restriction identified in the ROD/FEIS violated the Pinedale RMP. Appendix A-1 of the 1988 Pinedale Resource Area RMP at 59 identifies the February 1 to July 31 seasonal restriction and states that modification of this limitation in any year may be approved in writing by the Authorized Officer. More importantly here, Appendix A-1 provides at that same page that "modification of requirements, developed from this guidance must be based upon environmental analysis of proposals (e.g., plans of development, plans of operation, Applications for Permit to Drill) and, if necessary, must allow for other mitigation to be applied on a site specific basis." (Pinedale ROD/RMP, Appendix A-1 at 59, Ex. A to Intervenors' Answer and Response to Stay Request.) BLM prepared an EIS in this case modifying the seasonal restriction based on post-RMP research which more clearly defines sage grouse breeding and nesting activity. It included other mitigation to be applied on a site specific basis, including restrictions in the ROD/FEIS insuring that sage grouse nests identified through required surveys would be protected, regardless of when chicks left the nest, thus providing in some cases a broader seasonal restriction than that identified in the Pinedale RMP relied on by appellants. See BLM Answer at 3-4.

[3] We further find that BLM has provided sufficient rationale for adopting a 1/4-mile surface avoidance area. The record shows that there is no concrete scientific evidence in the record which proves or disproves the adequacy of a 0.25 mile buffer zone. At best, the record suggests that a 0.50 mile buffer zone as urged by appellants may be preferable. In the absence of more definitive scientific evidence or conclusions, however, we find that the annual surveys of leks and triennial monitoring to determine lek attendance, and the resulting collection of data, coupled with BLM's representations that additional mitigation measures may be required as necessary before any surface-disturbing activity is permitted, demonstrates that BLM took the requisite hard look at the environmental consequences of the proposed action and that the decision reflects a reasoned analysis. King's Meadow Ranches, 126 IBLA 339, 342 (1993).

Moreover, as BLM and Intervenors point out, NEPA does not require the courts or this Board to decide whether an EIS or environmental assessment is based on the best scientific methodology available or require us to resolve disagreements among various scientists as to methodology. See Greenpeace Action v. Franklin, 14 F.3d 1324, 1333 (9th Cir. 1992); Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir. 1985). Nor does NEPA compel a particular result or course of action, mandating only a fully informed decision and well considered decision. 40 C.F.R. § 1500.1(b); National Wildlife Federation, 145 IBLA at 359. Although the need for additional research to better ascertain appropriate sage grouse setbacks in the specific case of oil gas operations cannot be gainsaid, BLM's analysis of the available data was reasonable and provides an adequate basis for its decision.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by Secretary of the Interior, 43 C.F.R. § 4.1, BLM's decision approving the ROD/FEIS is affirmed and appellants' request for a stay is denied as moot.

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Gail M. Frazier
Administrative Judge

I concur:

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T. Britt Price
Administrative Judge